

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 19, 2008 Session

STATE OF TENNESSEE v. STANLEY KEITH HOLT

Appeal from the Circuit Court for Wayne County
No. 13855 Jim T. Hamilton, Judge

No. M2008-00047-CCA-R3-CD - Filed March 19, 2009

The Defendant, Stanley Keith Holt, was found guilty of manufacturing a Schedule VI substance under Tennessee Code Annotated section 39-17-417(j)(13)(A), a Class A felony. He was sentenced to fifteen years in the Department of Correction. In this direct appeal, he contends that: (1) the evidence at trial was insufficient to convict him; (2) the trial court erred in refusing to allow him to present a certain witness in his defense; (3) the trial court erred in failing to sentence him as an especially mitigated offender; and (4) the trial court erred in fixing a \$2,000 fine. After our review, we affirm the Defendant's conviction and sentence. We agree that the trial court erred in fixing a fine exceeding fifty dollars, however, and remand for the empaneling of a new jury for that purpose.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part;
Reversed in Part; Remanded**

DAVID H. WELLES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

Robert D. Massey, Pulaski, Tennessee, for the appellant, Stanley Keith Holt.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Mike Bottoms, District Attorney General; and Doug Dicus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The events underlying this case took place on June 15, 2005. On that day, members of the Governor's Task Force for Marijuana Eradication ("GTF") were operating in Wayne County on a tract of land owned by International Paper Company. Bradley Lund, a trooper with the Tennessee Highway Patrol, testified that as a member of the GTF, he flew a helicopter for the purpose of

locating marijuana plants. He would radio any discovery to his ground team. That team would then locate the plants and collect them.

On June 15, 2005, Trooper Lund observed a number of locations containing marijuana plants. The State introduced several photographs of the area in which the GTF was working on that day. Trooper Lund pointed out to the jury the locations at which he spotted marijuana.¹ Having spotted the marijuana around lunch time, Trooper Lund landed the helicopter and ate lunch with the ground team. After lunch, he refueled the helicopter and told the ground team where to find certain marijuana patches. Trooper Lund split up the six to eight ground team members among three locations. He sent Tennessee Bureau of Investigation (“TBI”) Special Agent George Barchuren and Wayne County Sheriff’s Department Investigator Steve Wilson to one particular marijuana patch, around which Trooper Lund had noticed a wire fence.

Agent Barchuren and Investigator Wilson advised Trooper Lund when they had finished inspecting that patch and collecting the plants contained therein. They returned to their vehicle and drove along one of the area’s dirt roads to rendezvous with other team members. Trooper Lund followed them in the helicopter. At some point, he noticed that Agent Barchuren and Investigator Wilson had stopped and exited their vehicle. He paid little attention until he received a radio message that “a turkey-hunting-type vest” had been “found with some materials in it” near the side of the dirt road.

Trooper Lund then radioed another nearby member of the GTF, Tennessee Highway Patrol Trooper Aussie Baxter, and asked him to join Agent Barchuren and Investigator Wilson with his K-9 unit, Amo. Still in his helicopter, Trooper Lund observed as Trooper Baxter arrived and allowed Amo to acquire a scent off the recovered vest. Amo began to track. Shortly thereafter, Trooper Lund saw Amo and the team members pull a man out of a nearby tree line and arrest him.

Trooper Lund landed his helicopter and joined the team members about five to ten minutes later. At that point the arrested man, who Trooper Lund identified as the Defendant at trial, had been brought up to the dirt road. The Defendant was wearing a long-sleeved camouflage T-shirt and “almost knee-high snake boot-type boots.” He had a long machete attached to his belt.

The Defendant was unable to answer questions “in a way that made sense” to Trooper Lund. The Defendant gave various answers to questions about his presence on the site, at times refusing to answer at all and at times saying he was out looking for turkeys or that he was out running because his doctor had recommended he get more exercise. Trooper Lund noted that the Defendant was apprehended about fifty to seventy-five feet away from another marijuana patch. Upon further inspection of that patch, he noticed “fresh-cut saplings” laid on top of the marijuana plants. In his experience, such saplings were used to obscure marijuana plants from aerial view. These saplings were not wilted, which, given the high temperature that day, further led Trooper Lund to believe they had been laid out very recently. The GTF found “about eight-hundred” total marijuana plants in the

¹The record on appeal does not contain any trial exhibits, including these photographs.

area that day; the farthest marijuana patch they found was about one-half mile from where the Defendant was apprehended.

Trooper Lund acknowledged that anyone in the area certainly would have heard his helicopter when it was in use both before and after lunch. He also noted that the Defendant could have found better hiding places in the immediate area. He would have had to move in order to do so, however, which would have made him easier for Trooper Lund to spot from the air.

Investigator Wilson also testified. He corroborated Trooper Lund's testimony that he and Agent Barchuren split off from the rest of the GTF after lunch in order to investigate a particular site. At that site, they found fifty-eight marijuana plants surrounded by chicken wire about two feet tall. "Small gauge, round, smooth wire" ran above the chicken wire for support. After uprooting the plants, they returned to their vehicle with the intention of rejoining the rest of the team. During their drive, a "camouflage pack" near the side of the road caught Investigator Wilson's attention. Stopping to investigate, he found two items—a camouflage vest with pockets and a green Army pouch with a belt attached. The vest was wet as if drenched with sweat.

Investigator Wilson began to suspect there was someone "on site" with them. Trooper Baxter arrived shortly thereafter with Amo. Amo got a scent from the vest and began to track the scent. Trooper Baxter and Agent Barchuren followed Amo. Investigator Wilson followed a few feet behind them. After a short while, Agent Wilson heard Trooper Baxter and Agent Barchuren giving "loud verbal commands." He drew his pistol and ran forward, where he observed the Defendant in a "virtual standing position" wearing a camouflage long-sleeved T-shirt, "Carhartt-type pants" and almost knee-length snake boots. Amo had a grip on the Defendant's right ankle area.

Investigator Wilson and Agent Barchuren then took the Defendant to the ground and handcuffed him. The Defendant was extremely hot and "dripping with sweat." Investigator Wilson read the Defendant his Miranda rights.² In response to questioning, the Defendant said that he had dropped his vest and pouch because he was afraid the GTF would find him and think the marijuana in the area was his. In response to questions about his presence in the area, the Defendant variously said that he was digging for ginseng, working on deer stands, working on food plots, and out for a walk or a run because his doctor had told him to get some exercise. The Defendant did not say anything about a deer feeder. He had difficulty speaking and his demeanor led Investigator Wilson to believe that he was under the influence of some substance. The GTF did not test the Defendant for drugs, however.

Investigator Wilson then searched the Defendant's vest and Army pouch. In the vest, he found a spool of what he believed to be the same small gauge wire he had seen supporting the chicken wire around the previously visited marijuana patch 200 to 300 yards away. He later returned to that site and retrieved a sample of the wire, a picture of which was introduced into evidence at trial. The police did not run any scientific tests comparing the two wire samples, however.

² See Miranda v. Arizona, 384 U.S. 436 (1966).

Investigator Wilson also found sunglasses, a headband, a pair of wire cutters, a rubber mallet, and two Gatorade bottles filled with a clear liquid he believed to be water. Investigator Wilson found another spool of the small gauge wire in the Defendant's pouch. The Defendant did not have any drugs or drug paraphernalia on his person and had only a small amount of money.

Investigator Wilson noted that all of the GTF members were wearing clothing clearly identifying them as police. After apprehending the Defendant, Investigator Wilson and Agent Barchuren helped the rest of the GTF collect the marijuana plants in the area. The team found a total of 815 plants.

The Defendant was arrested and released on bond "fairly early." On June 23 or 24, 2006, after the Defendant had been out of jail for about a week, Investigator Wilson participated in a raid on his house. The raid uncovered no drugs and no evidence of cultivation or production of marijuana.

Trooper Baxter, Amo's handler, also testified. He said that Amo tracked with his "nose on the ground" after getting a scent from the vest on the side of the road, which meant he was following the scent "step for step." About forty to fifty yards from where the vest was found, Amo stopped and looked up. Trooper Baxter did not see anything of interest and tried to pull Amo onward by his leash. Amo refused to move, so Trooper Baxter looked more carefully. He saw, in a one-and-a-half-inch gap between two trees at the edge of a nearby tree line, one eyeball and "part of the camouflage." He recognized what he saw as a man lying or squatting in the underbrush. Trooper Baxter drew his weapon and said, "Get up, show me your hands." Three times the man in the trees, who Trooper Baxter identified as the Defendant, stood up for a moment but immediately crouched back down. Trooper Baxter repeated his command each time. As the Defendant crouched back down the third time, Trooper Baxter released Amo. Amo first bit the Defendant on his right hand; the Defendant pulled his hand out of his glove and slipped away. Amo then bit the Defendant on his right leg and held on. Amo did not bite the Defendant on his arm or on his back. In accordance with K-9 unit procedure, Trooper Baxter examined the Defendant immediately after his apprehension and confirmed that he had no injuries and was not bleeding; his boot had apparently protected his ankle. The Defendant did not complain of any injuries.

Trooper Baxter corroborated Investigator Wilson's account of the Defendant's dress, mannerisms, and explanations for his presence. He also noted that it was very hot that day. He estimated the temperature to have been in the mid-nineties. He did not hear all of the Defendant's questioning because he returned Amo to his carrier. Finally, Trooper Baxter testified that Amo was trained to follow the strongest scent; Amo's failure to visit the surrounding marijuana patches did not indicate that the Defendant had not been in them. Trooper Baxter did not lead Amo to those patches to search for the Defendant's scent, however.

Agent Barchuren also testified. He corroborated Agent Wilson's account of the Defendant's apprehension, unusual behavior, and multiple explanations for his presence. Agent Barchuren noted that the Defendant was found about fifty feet from a marijuana patch. He did not remember how

many plants were recovered from that patch. The Defendant was found about 200 yards from a site surrounded by chicken wire. Agent Barchuren agreed with Trooper Baxter that the Defendant never complained of any injuries. Agent Barchuren also noted that he collected a representative sample from the 815 plants the GTF recovered that day and sent the sample to the TBI crime lab. The crime lab confirmed that the plants were marijuana. He did not recall ever finding anyone among a group of marijuana patches in any of his previous hundreds of marijuana eradication operations.

The Defendant, a self-employed carpenter and former Wayne County Sheriff's deputy, chose to testify. He said that Holt's Hunting Club, of which he was a member, had a hunting lease on the International Paper Company land. The Defendant's name was not added to the lease until two days after his arrest, but he said he had written and oral permission from club president Charlie Holt to be on the land. The Defendant had helped to construct shooting houses and duck ponds on the property. He went to the property on June 15, 2005, to check on a few of his deer feeders and, because he had recently been told about some trespassers on four-wheelers, to haul a tree-stand back to his house to protect it from theft. He introduced pictures of his deer feeders, shooting houses, and trophy room. He also introduced a picture of the location where his tree-stand had been installed about fifty yards from the site of his arrest; by the time he took the pictures a few days after his arrest, however, the tree-stand had been stolen. Fresh four-wheeler tracks led up to its former location.

He testified that dressing in camouflage was "a hobby" of his, and he routinely wore it even when sleeping. The Defendant lived about six miles from the International Paper Company property. He walked there on the day in question, wearing long sleeves to protect himself from the barbs, branches, and other growth on the property. Such a walk was not a problem for him because, at his doctor's behest, he had been an active runner for some time. He carried a machete with him in order to cut tree limbs out of his way while he walked. He brought small-gauge "baling wire" for hanging his deer feeders from trees. The Defendant acknowledged that he had no food on his person for replenishment of his deer feeders; he said he had planned to bring some back after returning home with his tree-stand, however.

After he had been on the property for about forty-five minutes to one hour, the Defendant heard a helicopter fly overhead. Sometime thereafter, he reached part of a dirt road closest to the tree-stand he wanted to remove. Because he planned to carry the tree-stand on his back, he removed his vest and pouch and laid them near the side of the road. When he reached the tree-stand, he found he could not get two of the attaching wing nuts to turn. He therefore planned to return to his vest to retrieve a pair of pliers.

As he walked back toward his vest, the Defendant "started hearing people talking and something going on." He "just stopped" because he did not know who the people were or what was going on. He was not hiding. He heard a voice tell him "to come out." He said, "Wait a minute, I'm coming out." He then said, "I've got a right to be out here, this is my hunting lease." In response, the voice called him an "SOB" and told him to get down. The Defendant repeated that he was coming out. Immediately afterwards, he was attacked by a dog. It bit him on his upper arm, on

the back of his leg, and on his back, tearing his shirt and causing him to bleed profusely and suffer scarring. The Defendant introduced pictures of these wounds and of his shirt. The dog never bit him on his hand.

The Defendant testified that none of the police would listen to him. He told them he was on the property to take down his tree-stand and “begged” them to walk fifty yards behind him and see it. They refused. He denied telling conflicting stories, but he said that he was not in a clear state of mind after being attacked by the dog. He noted that if he had been trying to hide, he would have retreated to the deeper part of the woods. He also said that Agent Barchuren told him that if he “claimed” one of the marijuana patches, he would not be charged for the rest of the plants in the area; the Defendant responded that they were not his. He testified that he had no knowledge of any marijuana plants on the leased land before that day despite spending a lot of time in that area. The Defendant introduced his ripped shirt into evidence. He also introduced a medical report taken on June 16, 2005, at Wayne County Medical Center in which he complained of dog bites.

Charlie Holt also testified. Despite sharing a last name, he was not related to the Defendant. He owned the 500-acre lease at issue on the International Paper Company land and gave the Defendant permission to hunt on it. He corroborated the Defendant’s testimony that the Defendant had made a number of hunting-related improvements on the land. He also said that he had experienced some problems in 2005 with unauthorized people coming onto the land.

Ken Holt, the Defendant’s younger brother, testified that he helped the Defendant construct food plots, duck ponds, and a shooting house on the leased land.

Sammy Franks, a school counselor and part-time minister, testified that he lived about three miles from the Defendant and frequently saw him running for exercise. He acknowledged that the Defendant did not wear camouflage and snake boots when running.

The jury found the Defendant guilty of manufacturing a Schedule VI substance. He was sentenced as a Range I, standard offender to fifteen years in the Department of Correction. He now appeals.

Analysis

I. Sufficiency of the Evidence

The Defendant first contends that the evidence against him was insufficient to prove his guilt beyond a reasonable doubt. Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal

defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

Tennessee Code Annotated section 39-17-417(a)(1) provides that it is an offense for a defendant to knowingly manufacture a controlled substance. "A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-302(b). "'Manufacture' means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin" Tenn. Code Ann. § 39-17-402(15). Marijuana is a controlled substance. Tenn. Code Ann. § 39-17-415(a)(1). Manufacture of five hundred or more marijuana plants is a Class A felony. Tenn. Code Ann. § 39-17-417(j)(13)(A).

The State contended at trial that the Defendant produced the 815 marijuana plants surrounding the area in which he was found. The Defendant argues on appeal that the State convicted him using wholly circumstantial evidence. We agree that the evidence was circumstantial. The GTF found the Defendant within fifty feet of a patch of marijuana and in an area containing hundreds of marijuana plants. The Defendant carried the same type of wire that GTF agents had found on another marijuana patch nearby. The plants in that marijuana patch had freshly-cut saplings laid over them, apparently in an effort to camouflage the marijuana from aerial view. The Defendant carried a machete suitable for cutting such saplings. Moreover, the leaves on the saplings had not yet wilted despite direct sun and mid-ninety-degree heat, indicating that the saplings had been placed there very recently. The GTF found no one else in the area. The testifying GTF members all agreed that the Defendant was unable to explain his presence at the time they apprehended him. The Defendant testified that his presence on the tract of property was due to his hunting-related activities which he routinely carried out on the property. He testified that he had absolutely no knowledge of any marijuana growing on the property. He refuted the law enforcement officers' accounts of the circumstances surrounding his discovery and apprehension. The jury evidently did not find the Defendant's alternative explanation of events credible. Under these circumstances, we conclude that the evidence was sufficient to support the finding of guilt beyond a reasonable doubt.

II. Denial of Proffered Defense Witness

Before trial began, the State moved to exclude the testimony of a proffered defense witness, Brian Keaton. Keaton would have testified at trial, and did testify at the hearing on the Defendant's motion for a new trial, that he was a member of Holt's Hunting Club which leased the land at issue in this case. He also would have testified that he had been convicted of marijuana manufacture in 1993 but that he did not grow any of the 815 marijuana plants found on the leased land, had no knowledge of the marijuana's presence, and was not present on the land on June 15, 2005. The trial court granted the State's motion and excluded Keaton's testimony as irrelevant. The Defendant argues that this decision was error.

A. Relevance

The determination of whether evidence is logically relevant is governed by Tennessee Rule of Evidence 401, which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Trial courts have broad discretion in assessing relevance, and we will not overturn their decisions absent an abuse of their discretion. State v. Dubose, 953 S.W.2d 649, 653 (Tenn. 1997).

Keaton's testimony regarding his 1993 conviction for marijuana manufacture would not, in our view, have had any tendency to make less probable the Defendant's guilt of manufacturing marijuana in 2005. The two events are unrelated.

Even if the evidence were relevant, it must also be considered under Tennessee Rule of Evidence 403, which states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Evidence that Keaton had access to the hunting lease property in this case would have been cumulative: the Defendant established that a number of other people had access to the land. The Defendant clearly wished, in presenting Keaton's testimony, to imply that Keaton's 1993 conviction tended to establish Keaton's guilt of this later crime. In our view, the trial court properly exercised its discretion to prevent the Defendant from presenting this innuendo as evidence.

B. Due Process

The Defendant also contends that Keaton should have been allowed to testify regardless of his testimony's admissibility under Rules 401 and 403. Our supreme court has recognized that "[e]xclusions of evidence may violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution even if the exclusions comply with rules of evidence. Principles of due process require that a defendant in a criminal trial have the right to present a defense and to offer testimony." State v. Flood, 219 S.W.3d 307, 315-16 (Tenn. 2007).

We consider three principles in determining whether a trial court's exclusion of testimony has violated a Defendant's due process rights: (1) whether the excluded evidence is critical to the

defense; (2) whether the evidence bears sufficient indicia of reliability; and, (3) whether the interest supporting exclusion of the evidence is substantially important. See id. at 316.

Again, the Defendant and his witnesses established at trial that the hunting club included a number of people authorized to be on the land. The witnesses also established that other individuals had been trespassing on the land despite the hunting club's efforts to exclude them. The jury, therefore, had proof before it tending to establish that many other people had the opportunity to cultivate the 815 marijuana plants. Under these circumstances, the Defendant cannot establish that the trial court deprived him of the ability to present his defense that someone else manufactured the marijuana at issue in this case. Keaton's testimony, therefore, was not critical to the defense. We have no reason to question the reliability of Keaton's potential testimony regarding his previous conviction; the Defendant, however, actually wished to benefit from what he hoped would be the unreliability of Keaton's testimony that he had no knowledge of or involvement with the marijuana plants in this case. The exclusion of Keaton's testimony, finally, was substantially important because it avoided presentation of information with little probative value but substantial prejudicial effect.

The trial court did not violate the Defendant's due process rights. This issue is without merit.

III. Sentencing

The Defendant next challenges the levying of a \$2,000 fine against him at sentencing. He also contends that the trial court erred in declining to sentence him as an especially mitigated offender. On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the

defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

A. Imposition of Fine

The Defendant's judgment form reflects that the trial court imposed upon him the minimum fine of \$2,000 at sentencing. See Tenn. Code Ann. § 39-17-428(b)(9). The Defendant argues that imposition of this fine violated the Tennessee Constitution, which mandates that "[n]o fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact" Tenn. Const. art. VI, § 14.

Tennessee Code Annotated section 40-35-301 outlines the procedure to be followed in imposing a fine over fifty dollars. In such a case, "[t]he jury shall report such fine with a verdict of guilty. When imposing sentence, after the sentencing hearing, the court shall impose a fine, if any, not to exceed the fine fixed by the jury." Tenn. Code Ann. § 40-35-301(b).

In this case, the jury did not report any fine with its verdict of guilty nor did it assess a fine on its verdict form. The State concedes that it "cannot find evidence of the jury's imposition of a fine." It maintains, however, that imposition of the \$2,000 fine is mandated by the operation of Tennessee Code Annotated section 39-17-428, which states that persons convicted of the offenses listed therein "shall be fined no less than" the amounts outlined. Tenn. Code Ann. § 39-17-428(a).

The Defendant is correct that his jury did not fix a fine and that the trial court did. Our supreme court has clarified that "a trial judge may fix a fine of over \$50 in only two circumstances. They are: (1) when the defendant waives the right for jury determination of the fine . . . and (2) when the fine is statutorily specified and allows no judicial discretion in its imposition." State v. Martin, 940 S.W.2d 567, 570 (Tenn. 1997) (citations omitted). Neither of those two circumstances are present in this case; the record contains no evidence of waiver, and the applicable statute "prescribes only a minimum fine." Id. The trial court's imposition of a fine therefore constituted error.

The Martin court noted that it had never required that a defendant's trial jury be the one to fix a fine. As a remedy, the court therefore remanded the case and directed that a new jury be empaneled for the purpose of fixing a fine. See id. Martin leads us to conclude that this remedy is also required here.

B. Denial of "Especially Mitigated Offender" Status

At sentencing, the Defendant requested that the trial court sentence him as an especially mitigated offender. The Defendant contends that the trial court erred in declining to do so.

Tennessee Code Annotated section 40-35-109(a) states that "the court may find the defendant is an especially mitigated offender, if: (1) The defendant has no prior felony convictions; and, (2) The court finds mitigating, but no enhancement factors." The Defendant meets both of these conditions. The trial court declined to sentence him as an especially mitigated offender, however, in part because of Agent Barchuren's testimony at the sentencing hearing that the Defendant and a

relative had recently been stopped in Texas for having expired tags on a trailer. At the time of the stop, they had \$53,000 in cash, a methamphetamine pipe, and a .38 pistol in their possession. The relative gave a statement that they had come to Texas to buy some marijuana, but they had been unsuccessful and were on their way back home. Neither was charged with a crime, and the Defendant's relative told police that the Defendant had no knowledge of the money, pipe, or pistol. The trial court expressed concern that this arrest reflected continuing drug activity on the Defendant's part. Noting the large amount of marijuana being grown, the trial court also said he "just [didn't] think that [the especially mitigated offender] statute was meant for a case like this."

The statute, by its language, does not entitle a criminal defendant to be sentenced as an especially mitigated offender. It instead authorizes a court to do so in its discretion under certain circumstances. The trial court was concerned about the amount of marijuana being grown. The trial court was also concerned about what it viewed as the Defendant's continuing criminal activity. We cannot conclude that it thereby abused its discretion in declining to sentence the Defendant as an especially mitigated offender. This issue is without merit.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the Defendant's conviction and sentence. We also remand to allow the empaneling of a new jury for the purpose of fixing a fine on the Defendant in accordance with Tennessee Code Annotated section 39-17-428(b)(9).

DAVID H. WELLES, JUDGE